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SUPREME COURT OF THE UNITED STATES

October Term, 1984

No._____

RODNEY BRYANT,
Petitioner

vs.

STATE OF TENNESSEE,
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Tennessee

D.C. DANIEL, JR.
Attorney for Petitioner
P.O. Box 960
401 West Main Street
Murfreesboro, TN 37133

W. MICHAEL CODY
State Attorney General
450 James Robertson Parkway
Nashville, TN 37219

37pp

QUESTIONS PRESENTED

(1) Were petitioner's rights against unlawful seizures under the 4th and 14th Amendments violated where he was lawfully operating his vehicle at the time when a city police officer stopped and detained petitioner until a Tennessee Highway Patrol officer arrived, when the officer who stopped and detained petitioner had observed no unlawful conduct, was unaware of any crime having been committed and had only heard a second hand police broadcast saying that a highway patrol officer was "in pursuit" of a light colored vehicle of the same make as that being driven by petitioner?

(2) Whether petitioner's arrest by a highway patrol officer for driving under the influence violated the 4th and 14th Amendments where the arresting officer had no knowledge of the identity of the driver of the vehicle he had been pursuing, had not observed defendant operating a vehicle, had received no communication or information from the officer who stopped defendant's vehicle, obtained no admission or information from defendant prior to the arrest and arrested defendant merely upon the assumption that defendant had been driving the vehicle he had been pursuing.

(3) Was any evidence obtained or observations made by either or both of the officers concerning defendant's physical condition, the illegal fruit of the unlawful stop and detention of defendant in violation of the 4th and 14th Amendments of the Federal Constitution?

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SUPREME COURT OF THE UNITED STATES

October Term, 1984
No. _____

RODNEY BRYANT,
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vs.

STATE OF TENNESSEE,
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Tennessee

OPINION BELOW

The Opinion and judgment of the Court below giving rise to this petition are as follows: the Opinion of the Tennessee Court of Criminal Appeals is reproduced in the Appendix (hereafter "A") at pages A 1-12 and the Order of the Tennessee Supreme Court denying petitioner's application for appeal to that Court is reproduced at A 12-13.

JURISDICTION

The Order of the Tennessee Supreme Court denying petitioner's application for permission to appeal to that Court was entered on October 1, 1984; no motion for a rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution states in part:

"...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

1. PRIOR PROCEEDINGS

This prosecution originated in the Circuit Court of Coffee County at Manchester, Tennessee. After petitioner's motion to suppress based upon an assertion of an illegal seizure or arrest under the 4th Amendment was denied (A 13), Dr. Rodney Bryant entered a negotiated plea of guilty to the offense of driving while under the influence with the stipulation and expressed approval of the Court

allowing the issue of the legality of defendant's arrest and the suppression of the evidence obtained therefrom to be appealed to the Tennessee Court of Criminal Appeals, as an issue dispositive of the merits of the case (A 16). Pursuant to said plea and conditioned upon his aforesaid right to appeal, petitioner was sentenced to a term of eleven (11) months and 29 days in jail with all but ten (10) days to be suspended (A 14,15); however, despite the fact that petitioner is a physician practicing medicine in Woodbury, Tennessee, the Court refused to allow the defendant to serve his sentence during non-working hours but required him to serve the ten (10) days consecutively and likewise refused to grant petitioner a restricted or limited driver's license thereby in effect making it illegal for the defendant to drive for any purpose for a period of one year (A 14, 15).

On June 12, 1984, a judgment was entered in the Court of Criminal Appeals at Nashville affirming petitioner's conviction but remanding the cause for an additional hearing as to petitioner's application for a restricted driver's license (A 1-12). A petition to rehear was duly filed by petitioner on the 21st day of June, 1984, which was thereafter denied by the Court of Criminal Appeals by an Order dated July 25, 1984 (A 17, 18). Petitioner then filed an application for permission to appeal to the Tennessee Supreme Court, but his application was denied by the Tennessee Supreme Court on October 1, 1984, thereby affirming his conviction and affirming the judgment of the Tennessee Court of Criminal Appeals (A 12, 13).

2. THE EVIDENCE

The petitioner was driving with his wife and children in the family automobile in the city limits of Manchester, Tennessee, just after 11:00 p.m. on November 24, 1983,

when he was stopped by Officer David Kennedy, an officer with the Manchester City Police Department.

Trooper John Savage is a Tennessee Highway Patrolman, and he testified that he was heading the opposite direction from a speeding vehicle on Interstate Highway 24 in Coffee County, Tennessee, and that he clocked it with his radar at approximately 110 mph and that he then had to slow down, cross over the median and give pursuit, whereupon the vehicle he was pursuing turned off at the exit ramp #110 and that as the officer pursued that vehicle he ultimately lost it. He further stated that he radioed a broadcast that he was in pursuit of the vehicle.

Trooper Savage stated that he at no time saw or alleged that the vehicle did anything other than drive at what he perceived to be an excessive rate of speed. Trooper Savage specifically acknowledged that at the time he observed the vehicle as it got off the roadway it was under control and that the vehicle stayed within the traveled portion of the roadway. At no time did he describe any erratic driving or anything indicative of a driver under the influence of alcohol but to the contrary the speed was so excessive and the control of the vehicle was such as to indicate that the driver had exceptional control of his abilities and vehicle. It was an overcast night, and when Savage saw the car he could not tell what color it was, and he did **not** get the license number of the vehicle.

Officer Kennedy testified that his police scanner was not in perfect working order and could just pick up bits and pieces of the police broadcast. Officer Kennedy had not seen the vehicle in question, and his only information came from the hearsay report over his police radio. The only information which he testified to receiving was a report broadcast by the Coffee County Communications Center which gave no details but merely

said that Trooper Savage was in pursuit and needed some assistance; and, Kennedy further testified..."when I turned onto 53 I heard Trooper Savage, that he was **in pursuit** of a light colored Porsche and he turned off Highway 53 down towards Woodbury". At no time did Officer Kennedy ever testify that he received any report that the vehicle he was looking for had committed any crime and Officer Kennedy did not even testify that he had heard any broadcast indicating that the vehicle was speeding. He at no time testified that he had any idea why the Trooper was pursuing the vehicle. The only information he testified to was that the Trooper was in pursuit of a light colored Porsche.

After receiving this information the officer testified that he pulled into the parking lot at Shoneys restaurant near the off-ramp of Highway 53 at I-24 and waited with his light turned off. While sitting in the Shoneys parking lot he observed a light colored Porsche that traveled back into Manchester from Woodbury where petitioner lives, traveling very slowly which he concluded was "like they were trying to sneak into town". He then pulled out, turned on his blue lights, and pulled the vehicle over where it stopped on the I-24 off-ramp. Petitioner was with his wife and three children.

Officer Kennedy approached the stopped vehicle and requested petitioner to give him his driver's license which petitioner did. Officer Kennedy then directed petitioner to exit the vehicle. Officer Kennedy stated that he concluded that the defendant was under the influence of alcohol based upon the consideration that "when he stepped from the vehicle, I did smell an odor of some type of alcoholic beverage on his breath and as I asked him to the rear of the vehicle, he was using his left hand leaning on the car using it like a crutch or something that he couldn't walk very well". Officer Kennedy stated that Trooper Savage arrived "about the time I got him

to the rear of his vehicle, the rear of Dr. Bryant's vehicle".

Officer Kennedy acknowledged that the radio communication from the dispatcher simply stated that Trooper Savage was in pursuit of somebody. It was not a direct radio communication between Savage and Kennedy and thus was hearsay upon hearsay. The radio log of Trooper Savage's transmission to his communication center did not mention the name Porsche until he had lost sight of the vehicle he was chasing on Highway 53 going away from Manchester.

Officer Kennedy acknowledged that he had not seen the vehicle on the road before he stopped it, that when he saw the vehicle and stopped it, the vehicle was going at a lawful speed, and that "there wasn't anything erratic or unusual about the driving of the vehicle". He acknowledged that he simply asked the driver for his license and asked him to get out of the vehicle which the driver did, and acknowledged that he directed him to get out of the car and maintained control of petitioner there.

Officer Kennedy, who made the stop did **not** state that he had heard Trooper Savage's broadcast concerning the alleged excessive speed of the vehicle on the interstate. Officer Kennedy testified to absolutely nothing that would give an indication that the vehicle was committing an offense in his presence at the time of arrest. Trooper Savage arrived **after** the stop had been made and after Kennedy had determined petitioner was under the influence.

Trooper Savage testified that when he arrived on the scene petitioner was out of his car and the other officer had his license. He further testified petitioner was detained by the other officer at the time of his arrival. Trooper Savage testified the arrest was **based solely upon the officers' observations**. No statements were relied

upon.

Trooper Savage described the vehicle he was pursuing as an automobile with a "spoiler" or air foil on the trunk which looked like two posts mounted eighteen inches to two feet high on the trunk with a bar mounted flat on top of the posts the width of the trunk. However, Officer Kennedy testified that the vehicle he stopped, which was petitioner's car, had a different type of air foil device. He described it as a "whale tail" or a one piece device sticking out behind the car like a fish tail. Thus, there is nothing in the record to establish that petitioner's vehicle is in fact the same vehicle which Trooper Savage had observed and pursued on I-24.

At the end of the chase at New Union School after heading away from Manchester and losing sight of the vehicle, Trooper Savage came back into Manchester. Since petitioner's vehicle was proceeding in the opposite direction on the Woodbury-Manchester Highway, Trooper Savage had to meet petitioner's vehicle as they passed one another, yet he did not recall seeing it.

Trooper Savage could not identify the color of the suspect car he observed on the interstate. He took no license number. He could not see who was driving the car or even the number of people in the car. He never saw petitioner drive any car. He could not see the driver of the suspect car and petitioner was out of his car and at the rear of it talking to Officer Kennedy at the arrest scene when Trooper Savage arrived.

When Trooper Savage confronted petitioner at the arrest scene to ask him why he had been driving at a high rate of speed, Savage testified..."He stated that I had the wrong vehicle, that it was not him that I had been in pursuit of". Petitioner denied the entire matter of a chase to both of the officers.

The Court of Criminal Appeals in its Opinion (A 3) specifically conceded,

> "It is not contested that **Kennedy observed no unlawful actions** by defendant or that the stop was based entirely on Trooper Savage's radio transmission. **In fact, Kennedy did not hear the Trooper say the vehicle was speeding,** and acted only on the request for assistance and an adequate description of the Porsche." (Boldness added) (A 3).

However, the Court of Criminal Appeals was in error in stating that Deputy Kennedy was acting on a request for assistance, since Deputy Kennedy stated that all he heard Trooper Savage state was that "He was in pursuit of a light colored Porsche and he turned off Highway 53 towards Woodbury". Nevertheless, the Court of Criminal Appeals conceded that the stop and detention by Deputy Kennedy was a restraint upon the liberty of the defendant within the prohibition of the Fourth Amendment of the United States Constitution and Article I, Section 7, of the Constitution of Tennessee (A 3,4) and conceded that "Even a brief detention, short of arrest and incarceration, must be based upon 'articulable facts or inferences from facts', which would support a reasonable conclusion that a crime had been or was about to be committed" (A 4). The Court of Criminal Appeals likewise conceded that "No intrusion based only upon the whim of unsupported hunch of an officer is constitutionally valid, and evidence acquired from such an intrusion may not be introduced at trial" (A 4).

The Court nevertheless held that the first officer's observations of speeding when coupled with the second officer's reliance on the broadcast constituted a reasonable and lawful basis for the stop and that the second officer's action "to maintain the status quo until **the witnessing officer** arrived to take further appropriate action" was lawful (A 4).

REASONS FOR GRANTING THE WRIT

1. THE SUPREME COURT OF THE STATE OF TENNESSEE IN UPHOLDING THE DECISION OF THE TENNESSEE COURT OF CRIMINAL APPEALS HAS APPLIED INCORRECT STANDARDS OF CONSTITUTIONAL LAW IN DETERMINING PROBABLE CAUSE TO STOP, DETAIN AND ARREST A DRIVER OF A MOTOR VEHICLE.

Petitioner suggests that this Court should review the probable cause for petitioner's stop, detention and arrest as a result of his operation of a motor vehicle because the Court below has interpreted the 4th Amendment prohibition against unreasonable seizures in such a way as to violate the meaning and the intent of the 4th Amendment and the prior decisions of this Honorable U.S. Supreme Court interpreting the 4th Amendment, as applied to the stop, detention and arrest of motorists. There were no articulable facts or inferences from facts which would support a reasonable conclusion that a crime had been or was about to be committed.

In the present case the facts are clear and the Tennessee Courts conceded that petitioner was stopped while driving his automobile despite the fact that the officer who stopped him had observed no evidence of unlawful conduct, had no knowledge or even suspicion that any crime had been or was about to be committed but acted solely and alone upon the police radio communication which simply stated that another officer was "pursuing" a light colored Porsche automobile heading in the opposite direction from the direction petitioner's automobile was proceeding. The officer who stopped petitioner had heard nothing to indicate that petitioner was speeding let alone committing any other driving or criminal offense and simply stopped petitioner because another officer was pursuing a vehicle of similar make.

Petitioner respectfully asserts that upon these facts and under these admitted circumstances there was no probable cause which would authorize the officer to stop and detain petitioner, to require petitioner to exit his vehicle or to hold petitioner until another officer arrived. Further, since the pursuing officer had lost sight of the vehicle which he was pursuing, had not been able to identify the driver of the vehicle which he was pursuing, had not observed petitioner operating a vehicle and only confronted petitioner after petitioner had been removed from his vehicle by the stopping officer, he simply had no justifiable basis for taking petitioner into his custody and charging petitioner with driving under the influence based upon observations of petitioner's sobriety at the scene of the arrest.

The Opinion of the Tennessee Court of Criminal Appeals which was affirmed by the Tennessee Supreme Court, acknowledged that,

> "Every official restraint upon the liberty of a person is subject to the strictures of the 4th Amendment of the United States Constitution, and in this state, of Article I, Section 7, of the Constitution of Tennessee. Even a brief detention, short of arrest and incarceration, must be based on 'articulable facts or inferences from facts,' which would support a reasonable conclusion that a crime had been or was about to be committed...No intrusion based only upon the whim or unsupported hunch of an officer is constitutionally valid, and evidence acquired from such an intrusion may not be introduced at trial."

However, despite acknowledging the requirement under the 4th Amendment that the officer, prior to stopping a motorist, must possess "articulable facts or inferences from facts which would support a reasonable conclusion that a crime had been or was about to be committed", nevertheless the Court held that the radio broadcast

which merely stated that another officer was "pursuing" a light colored Porsche vehicle was sufficient to justify the second officer in stopping and detaining petitioner, even though the stopping officer did not know why the highway patrol officer was in pursuit of that vehicle. The Tennessee Court of Criminal Appeals in the case at bar, stated:

> "We conclude that Officer Kennedy took reasonable action to maintain the status quo until the witnessing officer arrived to take further appropriate action." See **Pennsylvania v. Mimms**, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); **Adams v. Williams**, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)." (A 4).

Thus, under the decision of the Tennessee Courts in this case it is now the law of the State of Tennessee that a simple broadcast that a police officer is pursuing a vehicle for some unknown reason, without any report of the commission of a crime and without even a request for assistance, is sufficient to justify an officer who has observed no unlawful driving or activity to stop and detain a motorist until the witnessing officer arrives "to take further appropriate action". Such a rule of law clearly violates the very decisions upon which the Tennessee Courts purported to act and is a clear infringement upon the liberty granted to all citizens by the 4th and 14th Amendments.

The Tennessee Courts in basing a decision upon **Pennsylvania v. Mimms** and **Adams v. Williams** simply overlook the facts and the import of those decisions. In **Adams**, the facts were that a lone police officer was on patrol duty in a **high crime area**, when a person known to him approached the cruiser with **information that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist**. The officer went to the parked car, tapped on the window and asked

the occupant to open the door. When **Williams**, the occupant, rolled down the window instead, the officer reached into the car and removed a loaded revolver from Williams' waistband. The gun was not in plain view, but it was where the informant had indicated. The tip was reliable. Williams was arrested for unlawful possession of a hand gun. The **Adams** case made it clear that the right to frisk depends upon the validity of the investigative stop, and an investigative stop is permissible only when an officer has reasonable suspicion supported by specific and articulable facts. **In the present case, the stop occurred upon an open highway, not in a high crime area, and the officer had no information whatsoever that the defendant was at that time committing or about to commit any crime**. Thus, there is absolutely no analogy between the facts in the **Adams** case and the facts in petitioner's case.

Likewise, the **Mimms** decision had no relevance to the present case since there the Court was not dealing with the validity of the initial stop or intrusion but was concerned only with "the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable..." 434 U.S. at 109, 98 S.Ct. at 332, 54 L.Ed.2d at 336. Thus, since the issue regarding petitioner in the present case involves the initial intrusion and the authority of the stopping officer to stop and detain petitioner, there is absolutely nothing in the **Mimms** decision which would be relevant to or support the judgment of the Tennessee Courts in this case.

Beginning with **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), it has been unquestioned that "whenever a police officer accosts an individual and restrains his freedom to walk away he has 'seized' that person." 393 U.S. at 16, 88 S.Ct. at 1877, 20 L.Ed.2d at 903, and as the Court in **Terry** held in justifying the

particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. In the subsequent case of **U.S. v. Brignoni-Ponce**, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Supreme Court extended the **Terry** doctrine to vehicles and thereafter in **Delaware v. Prouse**, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) the Supreme Court reaffirmed that the stopping and detaining of a driver of an automobile is unreasonable under the 4th Amendment unless the officer has "an articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure in violation of law," 440 U.S. at 663, 99 S.Ct. at 1401, 59 L.Ed.2d at 673. In the present case there was not even an attempt by the stopping officer to articulate any reasonable suspicion that a crime had been committed. To equate as the Tennessee Courts have done, the mere knowledge that another officer is pursuing a vehicle of similar make and color without knowing why he is pursuing that vehicle and without any reason to believe that the motorist has violated the law is to deprive a citizen of the most basic and fundamental right against unlawful seizure of his person under such broad circumstances that an officer could justify any stop, detention and arrest by putting out a broadcast that he is pursuing a vehicle, even though he has no articulable reason to believe that a violation has been committed.

The opportunities for mischief and harm in such a doctrine are readily apparent. It would permit an officer to harass or in effect make random stops simply by putting out a broadcast that he is in pursuit of a vehicle so that any other officer who hears the broadcast would then have a basis for stopping any vehicle of similar

description by saying that he stopped him lawfully, simply because he was driving a similar vehicle and on the assumption that he must have done something illegal or else the initial officer would not have been pursuing him. Such a "legal" stop would then make admissible at a trial any evidence obtained as a result of this "lawful" stop. This simply cannot be countenanced and it is so unreasonable and violative of both the letter and the spirit of the 4th Amendment protection as to be wholly undeserving of the sanction of the courts.

Accordingly, petitioner respectfully submits that the Tennessee Courts have decided an issue of great substance and importance to all Americans in a way that denies our citizens the clear protection of the 4th Amendment and which will, if upheld, permit such abuse by law enforcement authorities as will deny the very essence of individual liberty and freedom. Since the Tennessee Supreme Court has thus decided this federal question of substance in a way that is not in accordance with the applicable decisions of this Court, sound discretion should be exercised to grant certiorari herein.

Respectfully submitted,
DANIEL, BURTON AND THOMAS

By: _____
D.C. Daniel, Jr. Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition For A Writ Of Certiorari was mailed, postage prepaid, to Mr. W. Michael Cody, State Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, 37219, and to the Attorney General's Office in Coffee County, Tennessee, on this 30th day of November, 1984.

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE NASHVILLE, JANUARY SESSION, 1984

STATE OF TENNESSEE,	)	C.C.A. NO. 83-240-III
	)	
Appelle	)	COFFEE COUNTY
	)	
v.	)	
	)	HONORABLE GERALD
	)	EWELL, JUDGE
RODNEY E. BRYANT,	)	
	)	
Appellant	)	(Driving While Intoxicated)

For the Appellant:

Scott Daniel and
D. Russell Thomas
Attorneys-at-Law
401 W. Main Street
P.O. Box 960
Murfreesboro, Tennessee

For the Appellee:

William M. Leech, Jr.
State Attorney General & Reporter
Nashville, Tennessee

Kymberly Lynn Anne Hattaway
Assistant State Attorney General
Nashville, Tennessee

Charles S. Ramsey, Jr.
District Attorney General
Manchester, Tennessee

Kenneth Shelton, Jr.
Asst. District Attorney General
Manchester, Tennessee

OPINION FILED: June 12, 1984

JUDGMENT AFFIRMED—CASE REMANDED FOR FURTHER PROCEEDINGS

John K. Byers
Judge

OPINION

The defendant pled guilty to a charge of driving while intoxicated and reserved the right to appeal a certified question of law. He was sentenced to eleven months and twenty-nine days in jail, with the right to apply for probation after serving ten consecutive days. The trial judge also imposed a $250.00 fine and prohibited the defendant from driving for one year.

The issue preserved for appeal is whether the initial detention of the defendant was unlawful and whether the evidence of intoxication should therefore have been suppressed. In addition, the defendant challenges the sentence.

The judgment of conviction is affirmed, and the case is remanded for further proceedings.

The defendant seeks to suppress dispositive evidence of his intoxication first on the ground that his initial detention was constitutionally invalid. The issue requires a recital of the facts leading to his arrest. The incident occurred after 11:00 p.m., when State Trooper Savage clocked an oncoming car traveling 110 miles per hour on Interstate 24. The record shows that the officer again checked his radar reading and crossed the median to stop the car approaching in the westbound lane. As he did so, his headlights illuminated the passing vehicle and he was able to identify it as a light-colored Porsche with a

spoiler affixed to the rear. The officer turned on his blue lights and called the area Highway Patrol dispatcher to report that he was in pursuit of this vehicle. The officer testified that the speeding vehicle was the only one on the interstate at the time.

Savage pursued the Porsche, reaching speeds of over 100 miles per hour, but was unable to catch up until the car left the interstate on an exit in Manchester. This chase covered two and one-half miles. At the exit, when local traffic interrupted the chase and the trooper lost sight of the car, he again radioed a description of the car and requested assistance. This transmission was directed to the local communications center.

Portions of the transmissions were heard by Officer Kennedy of the local police, who parked his car near the interstate to watch for the Porsche should it return to the interstate. In fact, the car appeared within one minute. Kennedy turned on his blue lights, and the defendant stopped his car several feet onto the I-24 entrance ramp. The officer asked for the defendant's drivers license and asked him to step out of the car.

The trooper had continued on the local highway for a short distance, as he returned to the intersection, he received word that a local officer had stopped the vehicle. He arrived at the entrance ramp to find the Porsche stopped and the defendant standing beside his car. After some conversation with the defendant, Trooper Savage arrested him on charges of speeding, reckless driving, and driving while intoxicated.

It is not contested that Kennedy observed no unlawful action by the defendant or that the stop was based entirely on Trooper Savage's radio transmission. In fact, Kennedy did not hear the trooper say that the vehicle was speeding, and acted only on the request for assistance and an adequate description of the Porsche.

Every official restraint upon the liberty of a person is

subject to the strictures of the fourth amendment of the United States Constitution, and in this state, of article I, section 7 of the Constitution of Tennessee. Even a brief detention, short of arrest and incarceration, must be based on "articulable facts or inferences from facts," which would support a reasonable conclusion that a crime had been or was about to be committed. **Hughes v. State**, 588 S.W.2d 296, 306 (Tenn. 1979). No intrusion based only upon the whim or unsupported hunch of an officer is constitutionally valid, and evidence acquired from such an intrusion may not be introduced at trial. **Id.**

The record shows the initial intrusion upon the liberty of this defendant was based upon the objective fact of another officer's request for assistance, and that request was based upon a reliable mechanical device and his own experience as he chased the defendant's car at high speeds. Similarly, the second officer's reliance on the broadcast over official radio frequencies was reasonable. We do not think that in these circumstances he should have seriously suspected that the requesting officer was engaged upon some personal errand or other pursuit unrelated to the commission of a crime.

We conclude that Officer Kennedy took reasonable action to maintain the status quo until the witnessing officer arrived to take further appropriate action. **See Pennsylvania v. Mimms**, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); **Adams v. Williams**, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). This detention was not a random or arbitrary exercise of police power condemned by the highest courts of both the nation and this state.

Secondly, the defendant asserts that under state law Officer Kennedy had no authority to effect a warrantless arrest for the misdemeanor, speeding, committed outside his presence. This common law rule is codified at T.C.A. §40-7-103.

We note initially that this limitation on warrantless arrests for misdemeanors is not constitutionally required. Further, in states that retain the rule, it is frequently held that in light of the increased speed with which offenders may flee from a witnessing officer and modern communications techniques available to the police, an offense may be said to have been committed in the presence of the arresting officer if he is in communication with and is assisting the witnessing officer. **See e.g. Howes v. State**, 503 P.2d 1058 (Alaska 1972); **State v. Cook**, 194 Kan. 495, 399 P.2d 835 (1965); **Robinson v. State**, 4 Md.App. 515, 243 A.2d 879 (1968); **Prosser v. Parsons**, 245 S.C. 493, 141 S.E.2d 342 (1965).

A review of decisions in this state does not convince us that §40-7-103 deprives a pursuing officer, who has grounds upon which to arrest a fleeing offender, of the assistance of a fellow officer when that assistance is requested in a reliable manner. The rule creates no right to escape. **See Williams v. State**, 506 S.W.2d 193 (Tenn. Cr. App. 1973) (Dwyer, J., concurring).

Were the rule otherwise, the apprehension of misdemeanants, even those presenting a danger to the public, would depend entirely upon the speed of the witnessing officer or his vehicle. As the trial judge noted, the defendant's reading of the statute would prevent highway patrolmen from enforcing the speed laws by the common practice of one lookout with radar and another officer positioned to stop and issue citations.

We hold that the initial detention of this defendant by the officer who heard the radio transmission was lawful and evidence in plain view of the officer would be admissible at trial.

Finally, the defendant challenges the length and terms of his sentence and the trial court's refusal to grant him a restricted driver's license. He argues that T.C.A. §55-10-403(a)(1) and -403(d) "entitles" a first offender

to forty-eight hour minimum mandatory sentence, to incarceration on non-working days, and to a restricted driver's license. He further argues that the trial judge abused his discretion by applying a local policy in contravention of the statute.

T.C.A. §55-10-403(a)(1) clearly authorizes a sentence from forty-eight hours to eleven months and twenty-nine days for a first offense, DUI. The record shows the district attorney general recommended a ten-day sentence, the defendant was aware of that recommendation, and he was given an opportunity to withdraw his plea when the court announced the ten-consecutive-day term.

The statute does mandate that if the sentence is the forty-eight hour minimum, it must be served on non-working days. No such limitation is placed on greater sentences. We find no abuse of discretion in the refusal to grant weekend sentencing.

§55-10-403(d) does not require the issuance of a restricted operator's license, but simply makes the defendant eligible for that privilege and vests the trial judge with authority and discretion in the matter. The court "may... order the issuance of a restricted license to be used exclusively for transportation to and from the holder's place of employment."

The record shows the trial judge did not exercise his discretion in this case, but rather stated, "Now, I assume you also have advised Dr. Bryant that I do not give any restricted licenses," and "I've been eleven years on the bench. I've never granted a restricted license." We are of the view that the defendant was entitled to apply for such license and be heard on his application.

In **State v. Hammersley**, 650 S.W.2d 352 (Tenn. 1983), the Supreme Court found an abuse of discretion in a district attorney general's failure to consider an applicant's personal eligibility for pretrial diversion. A similar policy should govern the privilege of a special license.

The pertinent statues do not detail the factors to be considered. Certainly those found throughout T.C.A. §55-7-113, referred to in §55-10-403(d), are appropriate. In addition, the defendant should be given an opportunity to present evidence of the extent to which his employment would be impaired by an inability to drive, and the availability of other transporation. The court may also consider whether the defendant is likely to repeat his offense and thus create a danger to others, and whether he is likely to comply with the restrictions of the license. After giving proper consideration to these factors, the trial judge, in his discretion, may grant or refuse such application.

John K. Byers, Judge

CONCUR:

Martha Craig Daughtrey, Judge

(DISSENTING OPINION)
John D. Templeton, Special Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE NASHVILLE, JANUARY 1984

STATE OF TENNESSEE
Appellee

CCA NO. 83-240-III
Coffee County

VS.

RODNEY E. BRYANT
Appellant

DISSENTING OPINION

I respectfully dissent because I am unable to agree the offense was committed in the "presence" of the arresting officer within the meaning of T.C.A. 40-7-103(1). In my opinion the evidence against appellant was the fruit of an unlawful warrantless arrest. I would reverse and dismiss.

I will restate briefly the relevant facts. Trooper John Savage detected by radar a motor vehicle approaching Manchester in the westbound lane of Interstate 24 at a speed of 110 miles per hour. He pursued the speeding vehicle along the Interstate into Manchester and off on to Highway 53 toward Woodbury. He was in touch by radio with both his own communication center in Chattanooga and the local center for Manchester and he requested assistance of Manchester police. Officer David Kennedy was directed by his communication center to go to Highway 53, "that Trooper Savage was in pursuit and needed some assistance". When Kennedy arrived at Highway 53, he turned his radio scanner on and heard Savage say "he was in pursuit of a light colored Porsche". Anticipating the Porsche might "double back" into town, Kennedy parked in a lot along Highway 53 some 500

feet from the Interstate on the Woodbury side. As he parked he heard Savage say on the radio he was at New Union School and had lost the vehicle. About a minute later Kennedy saw a light colored Porsche proceeding slowly back toward town on Highway 53. He followed and arrested appellant on the westbound Interstate ramp. It is agreed there was nothing unusual about the operation of the Porsche in Kennedy's presence. He stopped the Porsche only because he assumed it was the one Savage was looking for.

To prevent unlawful restraint of liberty for trivial causes our ancestors would not abide an arrest without a warrant except for a grave offense or for an offense committed in the presence of the arresting officer. 5 Am. Jur. 2d, Arrests, Sec. 4. The first part of our statute, T.C.A. 40-7-103(1)(2)(3)(4), is said to be an embodiment of the common law. **Tenpenny v. State**, 151 Tenn. 669, 270 S.W. 989 (1924). Arrest by an officer without a warrant for a misdemeanor not committed in his presence is unlawful in our state. **Hurd v. State**, 119 Tenn. 583, 108 S.W. 1064 (1907); **State ex. rel. Thompson v. Reichman**, 135 Tenn. 653, 188 S.W. 225 (1916). An offense is committed in the officer's presence where he has direct personal knowledge of the offense by the use of his senses. **Nelson v. State**, 219 Tenn. 680, 413 S.W. 2d 358 (1967). Arrests for violating motor vehicle laws have been held unlawful by this Court where the arresting officers acted entirely on information received by radio from other law enforcement agents. **St. John v. State**, 491 S.W. 2d 629 (Tenn. Cr. App. 1972); **Williams v. State**, 506 S.W. 2d 193 (Tenn. Cr. App. 1973).

So, our statute provides a safeguard against seizure over and above the guaranty contained in the Fourth Amendment to the Constitution of the United States and in Article 1, Section 7 of the Constitution of Tennessee. That an arrest is lawful under these constitutional pro-

visions does not mean necessarily it is lawful under the statute. If the arrest is without a warrant by an officer for a misdemeanor not committed "in his presence" it is unlawful.

But the Court here notes and adopts a holding in other states, "that in the light of the increased speed with which offenders may flee from a witnessing officer and modern communication techniques available to the police, an offense may be said to have been committed in the presence of the arresting officer if he is in communication with and is assisting the witnessing officer". If these circumstances obtain, the words in the statute, "in his presence", do not mean in the actual presence of the arresting officer; the offense is committed in his presence within the meaning of the statute although not actually in his presence at all. I suppose under other circumstances the words mean the same thing they always have, actual presence, whereby the arresting officer acquires direct personal knowledge of the offense by the use of his senses. By making the words "in his presence" mean out of the presence of the arresting officer in some circumstances and in his presence in others, the Court in my view imparts a Humpty Dumpty[1] quality to interpretation.

In treating of the reasons for the new rule, the Court observes that without it misdemeanants, including those

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[1] "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

—*Through The Looking Glass*, by Lewis Carroll.

endangering the public, might get away; and troopers could not enforce the traffic laws by the common practice of one trooper detecting a violation by radar and another who observes no violation making the arrest. In my opinion expediency is not a proper consideration for changing the meaning of a statute that has for its purpose the preservation of a liberty the people always have had.

The other reason for the new rule is the changes wrought by modern communication techniques available to the police. As I see it, this is the only reason that deserves consideration. The Court evidently feels that information about the offense acquired by radio is the equivalent of direct personal knowledge acquired by being present. Or as Judge Dwyer said, the information received by radio may be reliable enough to apprise the arresting officer an offense is being committed in his presence. **Williams v. State**, 506 S.W.2d 193, 198 (Tenn. Cr. App. 1974).

The Court has more confidence in policy radio communication than I have. The radio is used freely by numerous policeman and deputies sheriff and I am not sure all of them are anxious to prevent unlawful restraint of liberty for trivial offenses. In the very case before us Officer Kennedy had no information any offense at all had been committed. He stopped the light colored Porsche only because he assumed it was the vehicle Trooper Savage had been pursuing. There is no comfort in the fact Porsche automobiles are scarce in Coffee County. No doubt Officer Kennedy would have stopped a light colored Chevrolet if Trooper Savage had been trying to catch one.

Finally, the relatively narrow exception carved out by the Court can and will be expanded until the statute is destroyed altogether. Modern police communication spans wide geographical areas. The new rule soon will apply,

if it does not already, to an arrest by an officer in Chattanooga who is in communication with and assisting a witnessing officer in Nashville. At least a court would be sorely tempted to apply the rule in such a case if the arrest turned up evidence of a heinous crime.

It may be time to strike a balance between competing forces and modify the statute, say in the case of traffic violations such as driving while intoxicated. If so, the legislature is the proper department to address the problem. As I view the statute, it contains unambiguous words and their meaning has not changed. In changing the meaning the Court, in my opinion, undertakes to drive a square peg in a round hole.

John D. Templeton, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appelle	)	
	)	
vs	)	COFFEE CRIMINAL
	)	
RODNEY BRYANT,	)	
	)	
Appellant	)	

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF RODNEY BRYANT

Upon consideration of the application for permission to appeal and brief in support thereof of Rodney

Bryant, the answer of the State of Tennessee, the opinions of the Court of Criminal Appeals and the record in the cause,

Permission to appeal is denied at the cost of appellant.

PER CURIAM

IN THE CIRCUIT COURT OF TENNESSEE FOR THE SEVENTH CIRCUIT, PART II, AT MANCHESTER

STATE OF TENNESSEE

NO. 18,579

VS.

RODNEY BRYANT

ORDER

The motion to suppress the evidence filed herein by the defendant is overruled by the Court.

Although the brief and argument on behalf of the State recites that the same is in support of the State's motion to dismiss the defendant's motion to suppress, the Court finds no such motion to dismiss in the record.

Nevertheless, the Court is of the opinion that the defendant's motion to suppress is not well taken and should be overruled or dismissed, whichever terminology is appropriate.

ENTER: This the 12th day of July, 1983.

GERALD EWELL, Circuit Judge

ORDER OVERRULING MOTION TO SUPPRESS

FILED JULY 12, 1983

IN THE CIRCUIT COURT OF
COFFEE COUNTY, TENNESSEE

STATE OF TENNESSEE

NO. 18,579

VS.

RODNEY BRYANT

JUDGMENT

Comes the District Attorney General for the State and the defendant with counsel of record, the Honorable RUSSELL THOMAS for entry of judgment.

On the 15th day of JULY, 1983, the defendant having plead guilty to the offense of Driving While Under the Influence, 1st Offense (TCA 55-10-401), the defendant is convicted of Driving While Under the Influence, 1st Offense (TCA 55-10-401).

After considering the evidence, the entire record, and all factors, T.C.A. Title 40, Chapter 43, all of which are incorporated by reference herein, the Court's findings and rulings are:

1. The defendant shall pay a fine of $250.00.
2. The sentence imposed is eleven months and twenty-nine days.
3. The place of confinement is the local jail.
4. The defendant shall be continuously confined in the local jail for a period of TEN (10) DAYS, SUBJECT TO THE CONDITIONS STATED BELOW followed by probation for the balance of the sentence partially conditioned upon the defendant having the jailer of the COFFEE County Jail certify that the defendant has served the aforementioned period of time. Further, the defendant shall provide certification of compliance with paragraph 8 of this order. Failure to provide these

aforementioned certifications to the Court's probation officer within the period of probation will result in revocation of the defendant's probation.

5. The percentage of this sentence which must be served in the jail before the defendant is eligible for Release Classification Status is 75%.
6. The defendant is allowed jail credit of 0 days.
7. The defendant is prohibited from driving a motor vehicle in the State of Tennessee for a period of 1 year.
8. The defendant is to participate in an alcohol safety DUI school program, and for a second or subsequent offense, the defendant shall participate in a program of rehabilitation at an alcohol treatment facility.
9. The cost of this cause shall be paid by the defendant.

THE DEFENDANT MAY APPLY FOR SENTENCE TO BE SUSPENDED AFTER SERVICE OF TEN (10) DAYS OF CONFINEMENT.

Enter this the 19th day of JULY, 1983.

_____

GERALD EWELL, Circuit Judge

APPROVED:

_____

KEN SHELTON, JR.,
Assistant District Attorney General

_____

RUSSELL THOMAS
Counsel For Defendant

IN THE CIRCUIT COURT FOR COFFEE COUNTY AT MANCHESTER, TENNESSEE

STATE OF TENNESSEE	)	
	)	
VS	)	
	)	NO. 18,579
RODNEY C. BRYANT	)	Misdemeanor

ORDER AMENDING JUDGMENT

By agreement of the State and the Defendant, it is hereby ORDERED that the judgment of conviction heretofore entered in this cause be and the same hereby is amended by adding thereto the following, to-wit:

"Pursuant to Rule 37 TRCRP the Court expressly finds that the Defendant entered into a plea agreement under Rule 11(e) but explicity reserved with the consent of the State and of the Court the right to appeal a certified question of law that is despositive of the case. Said question of law is whether the trial Court erred in failing to grant Defendant's pre-trial Motion to Suppress all evidence relating or arising out of the stop and arrest of the Defendant without a warrant.

It is further ORDERED that the judgment of conviction is stayed pending Defendant's appeal.

It is further ORDERED by the Court that Defenant is hereby granted an appeal to the Tennessee Court of Criminal Appeals for the Middle Section at Nashville."

ENTERED THIS 18th day of August, 1983.

_____

GERALD EWELL, Circuit Judge

APPROVED FOR ENTRY:

_____

KEN SHELTON,
Assistant District Attorney

_____

D. RUSSELL THOMAS
Attorney for Defendant

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE NASHVILLE, JANUARY SESSION, 1984

STATE OF TENNESSEE,	)	
	)	
Appellee	)	
	)	C.C.A. NO. 83-240-III
v.	)	
	)	COFFEE COUNTY
RODNEY E. BRYANT,	)	
	)	
Appellant	)	

ORDER ON PETITION TO REHEAR

The appellant has filed a petition to rehear. After reviewing the petition, we are of the opinion he has not raised any matter which would entitle him to a rehearing.

The petition to rehear is therefore denied.

John K. Byers, Judge

CONCUR:

Martha Craig Daughtrey, Judge

John D. Templeton, Special Judge